

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-220589

DATE: January 30, 1986

MATTER OF: University of Dayton Research
Institute

DIGEST:

1. GAO will not review protest that the government should procure an item from a particular firm on a sole-source basis even where the protester claims its proprietary position makes it the only firm qualified to do the work.
2. Protest against agency's call for second round of best and final offers raised after the last date for receipt of offers is untimely.
3. Basis for protest that awardee may have infringed on protester's patents is not appropriate for review by GAO.

The University of Dayton Research Institute (UDRI) protests the award of a contract to Alloy Surfaces, Inc. (Alloy), under request for proposals (RFP) No. N00189-85-R-0016, issued by the Naval Air Rework Facility (NARF), Cherry Point, North Carolina. The RFP was issued for a braze cleaning system to be used for cleaning aluminum and titanium alloys by eliminating surface oxides.

The protest is dismissed in part and denied in part.

UDRI contends that since Alloy did not respond to the initial RFP by the closing date, and since NARF improperly reopened the solicitation, and Alloy then submitted a proposal, Alloy was not eligible for award. UDRI also argues that prior to the issuance of the RFP it submitted an unsolicited and unique proposal to NARF for a fluorocarbon cleaning system and NARF should have awarded UDRI a contract based on that proposal because it was based on a unique and innovative idea. In this connection, UDRI alleges that the RFP's specifications were based on the proprietary information submitted by UDRI. UDRI also protests NARF's request for a second round of best and final offers as being unnecessary and only for Alloy's convenience and that NARF

034426

improperly evaluated its proposal by adding a \$300,000 license fee to its fixed price of \$642,823, for a total of \$942,823, thus making its price higher than Alloy's \$810,000 offer. Finally, UDRI alleges that Alloy may be infringing on UDRI's patents.

UDRI submitted an unsolicited proposal for a braze cleaning system to NARF, which UDRI states was based on four UDRI patents, on August 29, 1983. NARF issued this RFP on October 26, 1984, with a closing date of November 26. UDRI was the only offeror to have submitted its proposal by the original closing date. NARF states that during a preproposal conference conducted on November 9, certain questions were raised at the conclusion of the conference concerning the required location for gas bottles and delivery terms which were not fully addressed in the RFP and participants were advised that a written amendment to the solicitation would be issued. NARF states that the amendment was not issued prior to the closing date and the contracting officer inadvertently failed to extend the closing date. However, in December, amendment 0002 reopened the solicitation and was issued to all of the offerors originally solicited.

Under the circumstances, we do not believe NARF acted improperly in setting a new proposal receipt date to allow offerors, including Alloy, to propose on the changes in the amendment. In any case, UDRI should have protested this matter at that time in order to be timely and for consideration under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (1985).

UDRI's contention that it should have been awarded a contract based on its initial, unsolicited proposal is essentially an argument that NARF should have restricted competition and awarded a sole-source contract. However, our Office does not consider it appropriate to review a protest that an agency should procure an item from a particular firm on a sole-source basis. Ingersoll-Rand, B-205792, Jan. 8, 1982, 82-1 C.P.D. ¶ 26. This is so even where the protester claims that its proprietary position makes it the only firm qualified to do the work. Marker-Modell Associates, B-215049, May 25, 1984, 84-1 C.P.D. ¶ 576.

UDRI next contends that NARF required it to include a licensing agreement with its offer. In response to this requirement, UDRI submitted a licensing agreement at a cost to the government of \$300,000 in addition to UDRI's fixed price of \$642,823. UDRI states that since it was the government that insisted that it submit the licensing

agreement, the government, in effect, caused UDRI's total evaluated offer of \$942,823 to be higher than Alloy's offer of \$810,000. UDRI states that its offer should have been evaluated instead at \$642,823, making it low.

NARF denies that it insisted upon a licensing agreement and the imposition of a fee. NARF states that UDRI insisted that its processes were patented and a license would have to be executed.

The solicitation itself did not require a licensing agreement. UDRI was requested, during negotiations and in reference to the paragraph entitled "Cost of Technology," of UDRI's cost proposal, to "please provide a copy of the licensing agreement, and the cost for the technology transfer if the Government will be charged for this." (Underscoring supplied.) The record before us shows therefore that UDRI was not required to insert a license fee and that the fee would be added only if UDRI chose to do so. Therefore, we find that NARF properly evaluated UDRI's price by combining the license fee as a cost to the government with its basic price. This basis of protest is denied.

UDRI also alleges that Alloy was awarded the contract even though it asserted that the use of data provided to the government by its unsolicited proposal was restricted. Accordingly, UDRI contends that Alloy should also have been assessed a licensing fee. Alloy, however, was only asserting that its proprietary information should not be released to UDRI in response to UDRI's Freedom of Information Act request. Alloy did not assert, as UDRI did, that its proprietary information required that the government pay a licensing fee. This basis of protest is denied.

UDRI protests NARF's holding a second round of best and final offers. UDRI was solicited for a second round of best and final offers by letter dated September 5, 1985. That notice stated that "Offerors may submit revised proposals which will be considered in the evaluation of award, provided it is received no later than 12:00 p.m. September 11, 1985." UDRI did not protest this request for a second round of best and final offers until well after the date for receipt of the final offers. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). Accordingly, this basis of protest is untimely and is dismissed. Sony Corporation of America,

B-220589

4

With regard to UDRI's allegation that Alloy may be infringing its patents, this serves no basis for objection to award to Alloy since patent infringements are not encompassed within our bid protest function. Presto Lock, Inc., B-218766, Aug. 16, 1985, 85-2 C.P.D. ¶ 183.

The protest is dismissed in part and denied in part.

for *Seymour E. For*
Harry R. Van Cleve
General Counsel